IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

David L. Royer,	:	
Plaintiff,	:	
v.	:	Case No. 2:05-cv-1134
Tigerpoly Manufacturing, Inc.,	:	MAGISTRATE JUDGE KEMP
Defendant.	:	

OPINION AND ORDER

This matter is before the Court on a motion for summary judgment filed by the defendant, Tigerpoly Manufacturing, Inc. ("Tigerpoly"). For the following reasons, the motion will be granted in part, and Mr. Royer's intentional tort claim will be dismissed. The FMLA claim, however, survives the motion.

I.

Tigerpoly is a manufacturing company in Grove City, Ohio that makes injection molded parts for automobiles. The plaintiff, David Royer, was a maintenance technician for Tigerpoly. His duties included, *inter alia*, general maintenance work, removing safety hazards and cleaning up spills.

On November 19, 2003, Mr. Royer was told to change the oil in a trash compactor. To do so, he had to drain the old oil out of the compactor and replace it with new oil. All used and unused oil was located in the Flammable Storage Building ("FSB"), which is a small building located just outside the main Tigerpoly facility. Inside the FSB, near the entrance, was a concrete hump in the floor. In other words, the floor of the building was not completely level.

Mr. Royer went to the FSB to get the oil to perform his task. He obtained approximately twenty gallons of oil from several

different 55-gallon steel drums that were nearly empty. Then, to get the remaining five gallons necessary, Mr. Royer pulled out a full 55-gallon drum. He had to move the full 55-gallon drum over the hump to extract the oil. Once Mr. Royer got the oil he needed from that drum, he tried to pull the nearly full drum back into the FSB. During this effort, he slipped on some spilled oil and fell backwards into another drum. Mr. Royer told his supervisor, Mike Hinty, and his Senior Technician, Jack Rhodes, that he slipped on oil in the FSB and hit his back. However, he finished his shift that day.

The next day, November 20, 2003, Mr. Royer appeared for work but left early because of pain in his back allegedly due to his fall in the FSB. Before he left, Mr. Royer informed Mr. Rhodes of his back pain and said that he would not be at work the next day because he was going to go see a doctor.

On November 21, 2003, Mr. Royer visited a doctor, and, after the visit, left Mr. Hinty a voicemail stating that he would not be at work that day. Mr. Royer also told Mr. Hinty that the doctor wrote a note indicating that Mr. Royer should not work for two weeks. However, Mr. Royer may also have said, in the same voicemail, that he would likely return to work on November 24, 2003.

Mr. Royer did not report for work or call regarding his absence on November 24, 2003. Messrs. Rhodes and Hinty and Ms. Watts called Mr. Royer at home to inquire about his absence. Mr. Royer claims that Ms. Watts fired him that day but later rescinded the termination when it was discovered that his absence was for medical reasons. Mr. Royer did tell Tigerpoly on November 24, 2003 that he would not return to work until December 1, 2003 pursuant to doctor's orders. Tigerpoly provided Mr. Royer with Family Medical Leave Act paperwork for his doctor to complete.

Mr. Royer's physician, Dr. Brian Pachmayer, sent a note to Ms.

Watts on November 25, 2003, which stated that Mr. Royer was "off work til 11/24-11/30 Return Monday 11/30 Seen 11/21 + 11/24 with employers ok - to see urologist Has CT 12/10/03" (Dep. of Judith Watts, Ex. 11). Further, on December 3, 2003, Dr. Pachmayer completed the "Physician Certification for Family or Medical Leave." (Id. at Ex. 13). The form asked the physician to fill in this statement (among others):

> As a result of this condition, it is my opinion that:
> __ The Associate is currently unavailable to perform his/her job.
> __ The Associate is currently needed to care for his/her spouse, child, parent.
> __ Intermittent leave is medically necessary for the Associate.
> __ Intermittent leave is medically necessary for the Associate to care for his/her spouse, child, parent.
> __ None of the above.

(Id. at p. 2) Dr. Pachmayer selected "None of the Above" and wrote "May due [sic] light duty until back specialist sees him." (Id.) The "Physician Certification" also indicated that Mr. Royer was not excused for any more days of work.

Ms. Watts sent Mr. Royer a "Response to Request for Family/Medical Leave" on December 9, 2003, stating that Mr. Royer was not eligible for FMLA leave because

> [y]our physician of record, Dr. Brian Pachmayer, stated on the FMLA forms that he completed for you that you did not need family medical leave. He indicated light duty only until you see a specialist. The specialist will determine at that time what course of action should be taken, indicating whether or not light duty should be continued.

(Reply to Defendants' Mot. for Summ. Judg., Ex. 2).

Tigerpoly has an established attendance policy based on "occurrence points" for absences. The policy states, in relevant

part:

Attendance Standards:

The attendance standards are based on a **No-Fault Occurrence Program**. An absence occurrence is defined as one or more consecutive days of absence for personal illness other than the following. All other absences are counted as singular days and individual occurrences of absenteeism.

(a) FMLA - Family Medical Leave
(b) Subpoena
(c) Earned Vacation
(d) Earned Free Day
(e) Jury Duty
(f) Death in the Immediate Family
(g) Marriage Leave
(h) Military Leave
(I) Workers' Compensation
(j) Natural disaster as determined by the President of Tigerpoly.

Points Associated With Occurrences of Absenteeism:
(All guidelines apply to eight (8) hour shifts)

- One or more consecutive days of absence for a medical reason = 1 point
- Tardy - 1 hour or less = 1/4 point
- Tardy - 1 to 4 hours = ½ point
- Tardy more than 4 hours = 1 point
- Leave early - 1 hour or less = 1/4 point
- Leave early - 1 to 4 hours = ½ point
- Leave early - 4 hours or more = 1 point
- No-call-no-show = 2 points for each day
-

Counseling & Discipline:

The No-Fault program is based on a maximum of six (6) occurrences in any rolling twelve month period as follows:

- 3 occurrences - verbal counseling with notation in file
- 4 occurrences - written warning

- 5 occurrences - final written warning
- 6 occurrences - discharge
- 2 consecutive no-call-no-shows
- - voluntary termination of employment

(Dep. of Judith Watts, Ex. 1). Mr. Royer accumulated 2.5 points prior to his injury in November 2003. Thus, because his November absences resulting from the fall in the FSB were not deemed covered by the FMLA, he was assessed additional points. When he did not report for work or call off sick on January 12, 2004, Mr. Royer was assessed additional points. Because he had accumulated 7.5 points in a twelve-month period, his employment was then terminated.

II.

Fed. R. Civ. P. 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original); Kendall v. The Hoover Co., 751 F.2d 171, 174 (6th Cir.1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," Anderson, 477 U.S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir.1978). Therefore, summary judgment will be granted "only

where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,...[and where] no genuine issue remains for trial,...[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 467 (1962); accord, County of Oakland v. City of Berkley, 742 F.2d 289, 297 (6th Cir.1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for a directed verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> The primary difference between the two motions is procedural: summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n. 11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed.R.Civ.P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord, Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir.1984), cert. denied, 469 U.S. 1062 (1985). Inferences to be drawn from the underlying facts contained in such

materials must be considered in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Association, Inc., 630 F.2d 1155, 1158 (6th Cir.1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60; Smith v. Hudson, 600 F.2d 60, 65 (6th Cir.1979).

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 251. As is provided in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, "a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 259 (1968)(footnote omitted).

III.

Mr. Royer alleges two separate claims in his complaint. In his first claim, Mr. Royer argues that Tigerpoly illegally

discharged him for using FMLA leave. In the second claim, Mr. Royer contends that Tigerpoly committed an intentional tort in violation of Ohio law because it knew or should have known about the oil on the floor in the FSB when he was injured. The Court will address the intentional tort allegation first.

A. *Employer Intentional Tort*

Generally, in Ohio, employees who are injured in the course of their employment are limited to the remedial measures outlined by the Ohio Workers' Compensation Act. See O. Const. II § 35. There are certain instances, however, where an employee may seek recovery outside of the Act. For example, an employee may recover outside Ohio workers' compensation laws if an employer commits an intentional tort. See, e.g., Blankenship v. Cincinnati Milacron Chemicals, Inc., 69 Ohio St.2d 608 (1982)(employee may sue employer for intentional tort outside the remedial measures of workers' compensation).

In order to establish "intent" for the purposes of determining whether an employer committed an intentional tort, a plaintiff must prove:

> (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
>
> (2) knowledge by the employer that if the employee is subjected by his employment to such a dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and
>
> (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Fyffe v. Jeno's, 59 Ohio St.3d 115, 118 (1991).[1]

Knowledge of a Dangerous Procedure

Fyffe first requires the employee to establish that the employer possessed knowledge of a dangerous process, procedure, instrumentality or condition within its business operations. In order to satisfy this prong, the employee must show that (1) a dangerous condition existed within the employee's business operations and (2) that the employer had knowledge that the dangerous condition existed. See, e.g., Dailey v. Eaton Corp., 138 Ohio App.3d 575, 581-82 (3d Dist. 2000). Dangerous work is different than a dangerous condition, and it is the latter that is the focus of this inquiry. Id. Additionally, "the 'dangerous condition' at issue must be one which falls outside the 'natural hazards of employment,' which one assumes have been taken into consideration by employers when promulgating safety regulations and procedures." Youngbird v. Whirlpool Corp., 99 Ohio App.3d 740, 474 (1994). This is not the "reasonable person" standard associated with determining negligence or recklessness; rather, an employee must prove that the employer had actual knowledge of a dangerous process, procedure, instrumentality or condition within its business operations.

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[1] As numerous courts have noted, Ohio Rev. Code § 2745.01 abrogated Fyffe, effective October 20, 1993. That legislation intended to override the standard enunciated Fyffe to make it more difficult for an employee to succeed in an employer intentional tort claim. The Ohio Supreme Court, however, determined that Ohio Rev. Code § 2745.01 was unconstitutional and reinstated Fyffe. Johnson v. B.P. Chemicals, Inc., 85 Ohio St.3d 298, 308 (1999)("Because R.C. 2745.01 imposes excessive standards (deliberate and intentional act), with a heightened burden of proof (clear and convincing evidence), it is clearly not a law that furthers the ... comfort, health, safety, and general welfare of all employees)(internal quotations omitted). In response to Johnson, the Ohio legislature revised Ohio Rev. Code § 2745.01, effective April 4, 2005. Because the alleged injury in this case occurred in 2003, there are no controlling statutes, and Fyffe and its progeny control.

In the instant case, Mr. Royer offers several depositions and an affidavit in support of his position that a genuine issue of material fact exists with respect to this issue. First, George Popovic, a senior technician and maintenance technician, stated, *inter alia*, in affidavit:

> Prior to November 2003, in performing my duties, I would go out into the [FSB] three to four times a week to dispose of oil and retrieve new oil. During that time period, there was almost always oil on the floor and it was generally one-half (.5) inch deep tapering to a coating of oil. Additionally, the floor was not level and because of that the oil would puddle in the corners of the [FSB].
>
> Prior to November 2003, there was no system or set dates to clean the [FSB] and there was no log or record for determining whether the [FSB] needed cleaning. During that time, even though the oil house floor was almost always covered with oil, the Maintenance Technicians would only be assigned by Mike Hinty to clean the floor of the oil house at the most twice a year, during bi-annual plant shut down periods in July and December. Moreover, during that time period, many times when the Maintenance Technicians were assigned by Mike Hinty to clean the [FSB] it was not completed because we lacked sufficient staffing.
>
> Before [Mr. Royer] was injured, everyone knew that the [FSB] needed to clean the building out [sic]. It was common knowledge that the [FSB] needed maintenance because of the oil that was almost always on the floor. Mike Hinty, Maintenance Supervisor, said on several occasions that the oil room needed to be cleaned. Additionally, during the bi-annual shut down periods Mike Hinty would assign us the duty of cleaning the [FSB]. However, even though it was assigned, many times we were unable to complete the cleaning of the [FSB] because we were short staffed. Additionally, during these occasions, Mike Hinty knew that

> we were unable to complete the cleaning of the [FSB].

(Aff. of George Popovic, ¶¶ 8-10). Second, Jack Rhodes, a senior technician, stated, *inter alia*, in his deposition:

> Q. Back in October or November 2003, do you know whether or not there was any oil on the floor of the [FSB]?
>
> A. I can't remember, but I do remember an instance that I had said at a shift change meeting - The day before I went in there for something, and there was oil on the floor. I came to the shift change meeting, basically told the guys, "Look, this is an accident waiting to happen out here. Are we going to continue walking in there or are we going to get this cleaned up?" I was pretty upset at the state of the building.
>
> Q. When you were saying you were telling the guys, which guys are you referring to?
>
> A. The maintenance staff at a shift change.
>
> ***
>
> Q. So safety solvents are stored in [the FSB], and sometimes you'll go out there and get those?
>
> A. Yes.
>
> Q. And other times you go out there to dispense of used oil; is that correct?
>
> A. Yes.
>
> Q. In the past, how often have you gone out there and seen oil on the floor?
>
> A. There have been occasions. I can't give you an exact number.
>
> Q. Was it more often than not when you went out there? Was it the majority of the time you saw oil?

A. Recently, the past few years, it's a rarity. I can't really recall seeing any oil on the floor recently.

Q. But before that, before the recent history, was it more often? Is that what you're saying?

A. The one time that I told you about, yes, it was very bad, and guys have been better at keeping that cleared up.

A. What about before that, before the past couple of years, because you said recently it's been pretty clean.

A. Yeah.

Q. Before that then it was it like every other time you went there or any idea of - just more often than it is now?

A. I couldn't give you an exact amount of times that there was oil on the floor. I didn't go out there a lot, to be honest with you. In my position, I don't really have to. But the times I did and it was in disarray or dirty, I would mention it and let the guys know they need to do a little better job on their clean-up.

Q. But at least recently now it has been better?

A. Yes, the few times I have been out recently, I haven't noticed any problems. If I didn't notice, then I would say it is okay. That's one of my pet peeves is oil. I don't like it on me, and I definitely don't like walking in it, so I would have definitely noticed.

(Dep. of Jack Rhodes at pp. 14-17). Finally, Mr. Royer testified:

Q. Also in paragraph five [of the complaint], you allege that the oil had been a constant problem for many months? What do you mean by a constant problem?

A. Guys go in there dumping waste oil and wouldn't hit the bucket. They wouldn't put the funnel in there. It runs off the side and runs on the floor.

Q. So the oil that you slipped on had accumulated gradually as more and more got spilled.

A. Yes. Disposing of waste.

Q. I guess what I wanted to clarify was the way it reads here, if [sic] sounds like the oil was spilled once and then was a constant problem from there on.

From what you're telling me, there's spill one time [sic] and then didn't get cleaned up and spill again and spill again several times [sic]. And then by the time you slipped on it, it had increased each spill?

A. Yes.

Q. Okay. I'm just trying to get a sense of whether it was a one-time spill that was the constant problem or this series of spills.

Did you personally bring the presence of the oil to anyone's attention during the months that it was present?

A. I talked to Jack Rhodes about it before then.

Q. Do you recall what the reason was or the - any more details about what you told Jack?

A. Because there was a lot of oil on the floor.

Q. About when would this have been?

A. During shutdown they cleaned the machines, all around the machines. The machines leak quite a bit. They are old. So he told me, yeah, that's on the list to get cleaned up at Christmastime. And then Keith had mentioned

it. So there had been discussions of it.

Q. Where these one-on-one with Jack Rhodes?

A. Yes.

(Dep. of David Royer at pp. 167-69). Viewing the evidence in a light most favorable to Mr. Royer, it appears that there is evidence that Tigerpoly knew that, prior to Mr. Royer's alleged fall, there was substantial oil on the floor in the FSB room. There is some authority for the proposition that the presence of slippery materials on a floor near an unguarded hazard is the type of dangerous condition that satisfies the first prong of the Fyffe test. See, e.g., Brookover v. Flexmag Industries, Inc., No. OOCA49, 2002-Ohio-2404, ¶108 (4th Dist. April 29, 2002) ("Additionally, the record reveals that appellant knew of the extremely slippery condition of the floor. Thus, in light of the fact that appellant knew that employees worked on a slippery floor surface near an unguarded, inrunning nip point, a reasonable jury could conclude that appellant had knowledge of a dangerous condition, beyond the natural hazards associated with appellee's employment, within its business operations"). The question then becomes whether this same analysis applies to a slippery floor that is, itself, the dangerous condition which purportedly satisfies this part of the Fyffe test.

In contrast, this case involves only a slippery floor in an oil storage area. Any business that maintains a supply of lubricants may experience a slippery floor from time to time. Slipping in oil in such an environment would seem to be a natural hazard associated with a business such as Tigerpoly's, especially when the type of injury that may occur is a typical "slip and fall" injury as opposed to an injury caused by exposure to an additional hazard such as an unguarded nip point. The Court is therefore skeptical that the dangerous condition which existed in the FSB was

of a character which satisfies the first prong of the Fyffe test. Nevertheless, the Court will assume, for purposes of discussion, that a jury could reach the opposite conclusion. That assumption does not alter the outcome of this case because, for the following reasons, the Court finds that no genuine issues of material fact exist with respect to the second prong of the Fyffe test.

Substantial Certainty

Fyffe's second prong requires the employee to prove that the employer had knowledge that if the employee were subjected to the dangerous process, procedure, instrumentality, or condition, then harm to the employee was a substantial certainty. Fyffe, 59 Ohio St.3d at 118. An employee, however, cannot prove substantial certainty by demonstrating negligence or recklessness. Id. Instead, the employee must prove more:

> To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequence will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk - something short of substantial certainty - is not intent.

Id. As the Sixth Circuit Court of Appeals noted, a plaintiff must show "that the employer '(1) specifically desired to injure the employee; or (2) knew that injury to an employee was certain or substantially certain to result from the employer's act, and despite this knowledge, still proceeded.'" Jandro v. Ohio Edison

Co., 167 F.3d 309, 313 (6th Cir.1999)(citing Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 193 (1988)).

The substantial certainty standard is a difficult one to satisfy. McGee v. Goodyear Atomic Corp., 103 Ohio App.3d 236, 246 (4th Dist.1995); Moore v. Ohio Valley Coal Co., No. 05BE3, 2007-Ohio-1123, ¶34 (7th Dist. March 7, 2007); Arnold v. Ebel, No. 06CA52, 2007-Ohio-479, ¶16 (5th Dist. Feb. 6, 2007); Renwand v. Brush Wellman, Inc., 149 Ohio App.3d 692, 697 (8th Dist.2002). An employee may establish substantial certainty through direct or circumstantial evidence. Hannah v. Dayton Power & Light Co., 82 Ohio St.3d 482, 485 (1998). This includes evidence of prior accidents, which, without such, makes it very difficult for the employee to prove substantial certainty. Taulbee v. Adience, Inc., BMI Div., 120 Ohio App.3d 11, 20 (10th Dist. 1997) ("Establishing the employer's knowledge of substantial certainty of harm is difficult where there are no prior accidents of similar character, but a lack of prior accidents is not necessarily fatal to the plaintiff's case"); Faust v. Magnum Restaurants, Inc., 97 Ohio App.3d 451, 455 (10th Dist. 1994)("Evidence of prior accidents involving the procedure at issue is one factor to be considered under the *Fyffe* analysis. While such evidence, standing alone, may not be conclusive, it strongly suggests ... that injury from the procedure was not substantially certain to result from the manner in which the job was performed")(internal citation omitted). To determine whether an employer had knowledge that the dangerous condition was substantially certain to cause injury, however, the focus is not only on how often similar accidents occurred but also on the employer's knowledge of the degree of risk involved. Taulbee, 120 Ohio App.3d at 21.

The Court concludes that this case is similar to Faust. In Faust, a restaurant employee was injured while disposing of grease from fryer vats. While carrying the vats of grease to the

disposal, without a lid and while hot, the employee slipped and dumped the hot grease on himself. There was evidence that the employee was not, at the time of the accident, wearing the safety material provided. The employee sued for an intentional tort but the court rejected his claim stating that Fyffe's second prong was not satisfied:

> In the present case, it was undisputed that the procedure had been performed "thousands of times" without prior accident. The evidence indicated that Faust himself had performed the procedure over one hundred times during the course of a year without incident.
>
> Construing the evidence most strongly in favor of plaintiffs, there was evidence of a lack of uniform application of the use of safety equipment in disposing of the hot oil, and evidence that management knew that the employees were not always wearing the equipment. However, while defendants' failure to ensure that the employees were, at all times, using the available safety equipment might indicate negligence, or even recklessness, such actions fall short of the higher standard of substantial certainty. The mere knowledge and appreciation of a risk does not constitute intent.

Faust, 97 Ohio App.3d at 456.

In the instant case, there appears to be no evidence regarding similar injury accidents in the FSB due to the oil on the ground. According to Mr. Royer's testimony:

> Q. Did you express to anyone at Tigerpoly that you did not want to perform any tasks that involved taking oil out of the [FSB] before your accident?
>
> A. No.
>
> Q. Are you aware of anyone other than yourself who was injured taking oil in or out of the [FSB]?

A. No.

Q. Are you aware of anybody other than yourself who was injured by slipping and falling on oil at Tigerpoly?

A. No.

***

Q. Are you aware of anyone else who actually slipped while moving a drum into or out of the [FSB]?

A. No.

Q. Are you aware of anyone else who almost slipped while moving a drum into or out of the [FSB]?

A. No.

***

Q. Okay. Prior to you being injured, no one else was injured slipping on that oil, is that correct, to your knowledge?

A. To my knowledge, no.

Q. Do you have any reason to think that anyone at Tigerpoly knew you would be injured given that no one else had ever been injured in that way?

A. No.

(Dep. of David Royer at pp. 173, 176-77, 179-80). In fact, the only evidence of Tigerpoly employees slipping on oil occurred in other parts of the Tigerpoly facility. (See Dep. of Judith Watts, Exs. 24-33).

Like Faust, the Court notes that employees like Mr. Royer went into the FSB on a daily basis to dispose of and obtain oil, as well as other industrial substances. For example, as indicated, *supra*,

Mr. Popovic stated, "[p]rior to November 2003, in performing my duties, I would go into the [FSB] three to four times a week to dispense of oil and retrieve new oil." (Aff. of George Popovic at ¶ 8). Additionally, Mr. Rhodes stated:

> Q. So safety solvents are stored in the [FSB], and sometimes you'll go out there and get those?
>
> A. Yes.
>
> Q. And other times you go out [to the FSB] to dispense of used oil; is that correct?
>
> A. Yes.

(Dep. of Jack Rhodes at p. 16). Given the amount of interaction all Tigerpoly employees, including Mr. Royer, had with the alleged constant oil on the floor in the FSB, combined with the fact that there appears to be no report of accidents due to that oil on the floor in the FSB, this Court simply concludes, as a matter of law, that injury to employees, including Mr. Royer, in the FSB because of the oil on the floor was not a substantial certainty. The facts which are not in dispute demonstrate that Tigerpoly's employees walked in and out of the FSB on a daily basis but rarely, if ever, slipped on the oil on the floor and injured themselves. A few isolated instances of employees slipping on the floor at other locations within the plant do not change this result.

On of the deposed witnesses, Mr. Rhodes, testified that the FSB was an "accident waiting to happen." Such a statement may be evidence of negligence or even recklessness, but it does not rise to the level of substantial certainty. While such a statement may assist in proving Fyffe's first prong, it is insufficient to prove substantial certainty. See Faust, 97 Ohio App.3d at 457 ("Finally, we note that plaintiffs have cited portions of an operations manual, which provides in part that '[f]iltering fryers is perhaps the most dangerous job in the restaurant." Such evidence regarding

the dangerous nature of the procedure, while going to the first element of the *Fyffe* test, is likewise insufficient to satisfy the requirement of substantial certainty.").

Finally, the Court notes Mr. Royer's own testimony that indicated he did not think he would be injured in the FSB. The record states:

> Q. Do you have any reason to think that anyone at Tigerpoly knew you would be injured given that no one else had ever been injured in that way?
>
> A. No.

(Dep. of David Royer at p. 180). If Mr. Royer failed to believe that he was going to be injured moving oil drums on a slick floor in the FSB, it is difficult for the Court to conclude that Tigerpoly knew with a substantial certainty that he would be.

Accordingly, no genuine issues of material fact exist regarding the second prong of Fyffe. As a matter of law, Mr. Royer cannot prove knowledge by Tigerpoly that if Mr. Royer was subjected to the oil on the floor in the FSB, then harm to Mr. Royer would be substantially certain. Because all three Fyffe elements must be satisfied, the Court need not address the third prong, and summary judgment on the employer intentional tort claim is appropriate.

B. *FMLA*

The FMLA claim turns on the correct characterization of the November days which Mr. Royer missed due to his injury in the FSB. It is uncontested that, prior to Mr. Royer's accident on November 19, 2003, he had accumulated 2.5 points. It is also undisputed that Mr. Royer received two no-call-no-show points on January 12, 2004, for a total of 4.5 points. Under Tigerpoly policy, if an employee receives 6 or more occurrence points in any rolling twelve-month period, the employee is terminated. Therefore, if any of November 20, 21 and 24 were are not FMLA-protected days, those

days would properly count toward Mr. Royer's accumulated points. It is not disputed that by counting any of those days, Mr. Royer's point total would have exceeded the maximum allowed and the termination would be justified. On the other hand, if the days were FMLA-protected, the termination was improper.

Tigerpoly claims that Mr. Royer's November absences were not FMLA-protected because he "never provided Tigerpoly with the required medical certification that he was entitled to FMLA leave due to a 'serious health condition.'" (Def. Mot. for Summ. Judg. at p. 12). Specifically, Tigerpoly argues that Dr. Pachmayer's note and completion of Tigerpoly's "Physician Certification for Family or Medical Leave" were insufficient to establish that Mr. Royer had a "serious medical condition." In response, Mr. Royer contends that he provided Tigerpoly with proper notice of his serious medical condition and was terminated because he exercised FMLA-protected rights.

The FMLA entitles qualified employees to twelve weeks of unpaid leave each year if, among other things, an employee has "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). A serious health condition is one which requires "impatient care in a hospital, hospice, or residential medical care facility" or continuing treatment by a health care provider. 29 U.S.C. § 2911(11). Under the FMLA, "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C. § 2615(a)(1). Employers who violate this section are "liable to any eligible employee affected" for damages and "for such equitable relief as may be appropriate." 29 U.S.C. § 2617(a)(1).

To prevail on a claim for denial of FMLA-protected rights under § 2615, a plaintiff must prove that (1) he is an eligible

employee, 29 U.S.C. § 2611(2); (2) the defendant is an employer, 29 U.S.C. § 2611(4); (3) the employee was entitled to leave under the FMLA, 29 U.S.C. § 2612(a)(1); (4) the employee gave the employer notice of his intention to take leave, 29 U.S.C. § 2612(e)(1); and (5) the employer denied the employee FMLA benefits to which he was entitled. Cavin v. Honda of America Mfg. Inc., 346 F.3d 713, 719 (6th Cir.2003). It is undisputed in the record that Mr. Royer was an "eligible employee" and Tigerpoly was an "employer" within the definition of the Act.

In order to be entitled to take leave, the FMLA allows an employer to require sufficient certification by the health care provider that the employee has a serious medical condition. 29 U.S.C. § 2913(a). For purposes of FMLA, "sufficient certification" means:

> Certification provided under subsection (a) of this section shall be sufficient if it states:
>
> (1) the date on which the serious health condition commenced;
>
> (2) the probable duration of the condition;
>
> (3) the appropriate medical facts within the knowledge of the healthcare provider regarding the condition; [and]
>
> (4) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee ...

29 U.S.C. § 2613(b)(1)-(4)(B).

> An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for

> example. The employer should inquire further of the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave ... .
>
> An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. ... However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

29 C.F.R. § 825.302(c)-(d).

Here, as noted above, Mr. Royer was injured on Wednesday, November 19, 2003. The next day, Thursday, November 20, 2003, Mr. Royer reported for work but left early allegedly due to back pain resulting from his fall the previous day. On Friday, November 21, 2003, Mr. Royer visited a doctor, and, after the visit, left Mr. Hinty a voicemail stating that he would not be at work that day. Additionally, Mr. Royer informed Mr. Hinty that the doctor wrote a note indicating that Mr. Royer should not work for two weeks. Evidence provided by Tigerpoly demonstrates, however, that Mr. Royer indicated in his voicemail that he would likely return to work on Monday, November 24, 2003.

Mr. Royer did not report for work or call regarding his absence on Monday, November 24, 2003. In response, Messrs. Rhodes and Hinty and Ms. Watts called Mr. Royer at home to inquire about his absence. At that time, Mr. Royer claims that Ms. Watts terminated him because he missed work but later rescinded the termination when it was discovered that his absence was for medical reasons. Further, Mr. Royer informed Tigerpoly that he would not

return to work until Monday, December 1, 2003 pursuant to doctor's orders. Tigerpoly provided Mr. Royer with Family Medical Leave Act paperwork for his doctor to complete. The note that Dr. Pachmayer sent to Tigerpoly stated, "off work til 11/24-11/30 Return Monday 11/30 Seen 11/21 + 11/24 with employers ok - to see urologist Has CT 12/10/03" (Dep. of Judith Watts, Ex. 11). Further, on December 3, 2003, Dr. Pachmayer completed the "Physician Certification for Family or Medical Leave." (Id. at Ex. 13). Although, on this form, which asked Dr. Pachmayer to give an opinion that:

> As a result of this condition, it is my opinion that:
> __ The Associate is currently unavailable to perform his/her job.
> __ The Associate is currently needed to care for his/her spouse, child, parent.
> __ Intermittent leave is medically necessary for the Associate.
> __ Intermittent leave is medically necessary for the Associate to care for his/her spouse, child, parent.
> __ None of the above.

Dr. Pachmayer selected "None of the Above," he also wrote "May due [sic] light duty until back specialist sees him." (Id.) The "Physician Certification" also indicated that Mr. Royer was not excused for any more days of work.

Tigerpoly claims that this case is similar to Woods v. DaimlerChrysler, 409 F.3d 984 (8th Cir.2005). In Woods, an employee was terminated for using leave that the employer deemed to be unprotected by the FMLA. The facts and analysis are best summed up by the Court of Appeals:

> In this case the district court granted summary judgment to DaimlerChrysler on the grounds that Woods had not shown that he gave adequate and timely notice that he needed FMLA leave. In analyzing that issue the district court focused on whether it was possible or practical for Woods to have given notice before he left work

on April 20 and whether his voicemail message on April 23 was sufficient notice. ...

DaimlerChrysler did not deny Woods FMLA leave or discharge him after his initial communications. Instead, Michele Wyatt prepared a report indicating that he was absent due to an unknown illness and HR Manager Ron Wander wrote him a letter indicating that his absence was regarded as unsubstantiated and that he should report immediately about it. If he wanted FMLA leave, Woods had the responsibility to give notice as soon as both possible and practical that a serious health condition caused his absence. DaimlerChrysler was entitled under the FMLA to seek further information with specific medical facts and verification of its employee's request for leave.

Wander's April 24 letter was sent after Woods had left his two 6 a.m. voicemail messages stating that he was seeing a doctor and would be forwarding his note. In his letter Wander cited Woods' unsubstantiated and unauthorized absence from work on April 20 and his responsibility to conform to the company Standards of Conduct, and he also ordered Woods to report to Wyatt by April 27. Even though Woods received the letter by the reporting deadline, he did not contact Michele Wyatt and never provided substantiation of a need for FMLA qualifying leave. Woods took no immediate action to supplement his abbreviated voicemail messages or the initial doctor note which only mentioned "evaluation and treatment."

Woods chose to respond by writing Wander on April 30 to say he had left work ten days before because he was stressed and felt his health was at risk, but he provided no information to indicate that his absence was due to a serious health condition. He also failed to say when he would return to his position, if it all, but only that he would like to discuss a healthy and rewarding role at the company. The enclosed second note from Dr. Heidbrier merely stated that Woods had

been "advised to remain off work until 5/6/01," again offering no diagnosis and no mention of a serious health condition making him unable to perform the functions of [his] job.

During his appearance at the plant on May 7, Woods offered no additional information or substantiation to show his absence was because of a serious health condition making him unable to work. Even though he was given a letter on May 7 informing him that he was being suspended immediately until further investigation and that his continued employment turned on the outcome of that investigation, Woods failed to provide more information or verification about any serious health condition up to the time of his discharge on May 18. ...

Cases in which plaintiffs failed to make out an FMLA case for lack of adequate and timely notice are instructive here. Similar to the notes submitted by the unsuccessful plaintiff in *Bailey*, the doctor notes furnished by Woods did not specify any serious health condition preventing him from performing his work or the duration of his absence, and Woods presented no evidence that it would have been impracticable to provide more detailed information after he was notified by DaimlerChrysler that his absence was unsubstantiated. The notes Woods submitted merely said he was advised to remain off work without saying why and only referred to unspecified evaluation and treatment. Like the employee in *Carter*, Woods failed to comply with the employer's expressed need for information substantiating his absence and never informed DaimlerChrysler of any diagnosis or anxiety and depression. Woods is also like the employee in *Collins*, who did not provide her employer with information implying a serious health condition or an indication of when he would return to work. ...

Although he was given time to substantiate that he needed FMLA leave, he never submitted

> any verification that he had a serious health condition making him unable to perform the functions of his job.

Woods, 409 F.3d at 992-94.

Woods is similar to the case at bar to the extent that, like Mr. Woods, Mr. Royer, after missing work due to an injury, called his employer and left a voicemail that he would not be at work on Friday, November 21, 2003. Further, as in Woods, the doctor's note provided to Tigerpoly is vague and fails to indicate with any specificity the serious health condition preventing Mr. Royer from performing his job functions. This is where the similarities end, however. Unlike the plaintiff in Woods, Mr. Royer did provide his employer with additional information that verified he potentially had a serious medical condition making him unable to perform his job function. In other words, whereas in Woods, DaimlerChrysler continually requested information to substantiate the doctor's orders for missing work, which is permissible under the FMLA, Mr. Royer's physician completed the "Physician Certification for Family and Medical Leave."

On Mr. Royer's "Physician Certification for Family and Medical Leave," Dr. Pachmayer failed to check the box to indicate that "[t]he associate is currently unable to perform his/her task." Instead, the physician checked "None of the above" and wrote a note indicating that Mr. Royer "may due [sic] light duty until back specialist sees him." Because of this hybrid answer, and viewing the facts in a light most favorable to Mr. Royer, the Court cannot determine exactly what job functions Mr. Royer could or could not perform. Thus, the Court cannot make a determination whether Mr. Royer was suffering from a serious medical condition in order to qualify for FMLA leave.

According to Tigerpoly's job description of a Maintenance Tech I, which was Mr. Royer's title at the time of firing, Mr. Royer's

"typical day" consisted of hourly walking and standing. (Dep. of David Royer, Ex. Z). Further, Mr. Royer's job duties included frequent (defined as 1.5 to 5.5 hours per day) bending, stooping, reaching above his shoulder, kneeling, and pushing and pulling. (Id.) It also included occasional (defined as .25 to 2.5 hours per day) climbing, balancing, crawling, crouching, as well as lifting and carrying items over 120 lbs. (Id.)

It could be true that, given Mr. Royer's job duties, his "light duty" restriction would have precluded him from working within his job function. Conversely, a restriction to "light duty" might have allowed him to participate in nearly all of his job activities. At a minimum, however, because Mr. Royer was limited to "light duty," Tigerpoly had notice that Mr. Royer suffered from a health condition that had an impact on his ability to perform some work functions. It would have either known at that point that Mr. Royer's job was not ordinarily a "light duty" job or that some of his job duties may have been inconsistent with Dr. Pachmayer's certification. If there was an ambiguity at this point, Tigerpoly could have requested more information. See, e.g., Peter v. Lincoln Technical Institute, 255 F.Supp.2d 417, 444 (E.D. Pa. 2002)("Even if it is true that the notation "indefinite" does not satisfy [29 C.F.R. § 825.306(b)(2)(i)], the fact remains that the proper course of action for an employer who receives inadequate medical certification is not termination. Instead, such an employer is under an obligation to provide an employee with a reasonable time in which to correct or amend their certification"); Aboukora v. Keebler, Inc., No. 3:04-cv-0059, 2006 WL 839238 at *9-10 (M.D. Ga. March 30, 2006)(employer's motion for summary judgment denied because doctor's certification was ambiguous as to whether employee could perform job functions that would entitle him to FMLA leave).

Here, Tigerpoly apparently concluded that the generic phrase "light duty" meant that Mr. Royer was able to perform the functions

of his position and, therefore, denied FMLA leave. However, given Mr. Royer's job functions as described in the Maintenance Tech I description, it could reasonably be inferred that "light duty" precluded Mr. Royer from performing these functions. Accordingly, there are genuine issues of material fact surrounding whether Mr. Royer was entitled to take FMLA leave. Should the jury conclude that Mr. Royer could perform his job function at Tigerpoly after his accident but missed work anyway, then his termination was justified because of the point accrual. On the other hand, if a restriction to "light duty" prohibited Mr. Royer from performing his job function, Mr. Royer should have been allowed to take FMLA leave for missing work in November, and his subsequent termination was not justified.

IV.

Based on the foregoing, defendant's motion for summary judgment (doc. 17) is GRANTED to the extent of dismissing the employer intentional tort claim under Ohio law. However, genuine issues of material fact surround the FMLA claim, and summary judgment is DENIED on that claim.

/s/ Terence P. Kemp
United States Magistrate Judge